

FREEDOM OF INFORMATION ACT APPEAL

HQ-APP-00014-05

(reference: 07-RIN-00334-05)

REQUESTER: Jim Hecker

Request Date: May 10, 2005

COMPANY: Trial Lawyers for Public Justice **Received Date:** May 10, 2005

FEE Category: Commercial

Subject: All evaluations, analyses, reviews, comments, and/or peer reviews concerning the 12/17/04 Technical Report on: Area Air, Soil and Water Monitoring during Asbestos Demolition Method Conducted at: Lambert-St. Louis International Airport, Landscape Building, 11101 Natural Bridge Road, Bridgeton, Missouri

Due Date: June 08, 2005

ASSIGNMENTS:

OGC

SPECIAL INSTRUCTIONS:

OGC = Action

Region 7 = FYI

(reference 07-RIN-00334-05)

IF COSTS ARE EXPECTED TO
EXCEED \$25.00, CONTACT
REQUESTER FOR PAYMENT
COMMITMENT BEFORE
PROCESSING REQUEST.

Barbara Buea 5/14/05
REC'D BY / DATE

FIS Initials: LP



TRIAL LAWYERS FOR PUBLIC JUSTICE
THE TLPJ FOUNDATION
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WASHINGTON, D.C. 20036

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FACSIMILE TRANSMISSION COVER PAGE

To: EPA FOIA Staff (2822T)

Fax Number: (202) 566-2147

From: Jim Hecker

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Message:

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TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C.

May 10, 2005

VIA Fax (202-566-2147) and Regular Mail

Freedom of Information Operations Staff (2822T)
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Appeal
OGC - Action
Region 7 - FYI
HQ - APP-00014-05
(07-RIN-00334-05)

Re: Appeal of Denial of FOIA Request No. 07-RIN-00334-05

Dear Sir or Madam:

On March 17, 2005, I submitted a FOIA request (attached) on behalf of Families for Asbestos Compliance, Testing and Safety (FACTS) for "all evaluations, analyses, reviews, comments, and/or peer reviews concerning the December 17, 2004 'Technical Report on: Area Air, Soil and Water Monitoring during Asbestos Demolition Method Conducted at: Lambert-St. Louis International Airport, Landscape Building, 11101 Natural Bridge Road, Bridgeton, Missouri.'" In a April 13, 2005 response (attached), EPA Region 7 Regional Counsel declined to release 15 documents in response to this request on the ground that they were exempt from disclosure under 5 U.S.C. § 552(b)(5) and 40 C.F.R. § 2.105(a)(5) ("Exemption 5").

Pursuant to the Freedom of Information Act and 40 C.F.R. § 2.104(j), I am appealing this adverse determination, for the following reasons:

1. EPA did not make a reasonable effort to search for and produce all documents related to the FOIA request, including documents in other EPA offices such as EPA Headquarters in DC and EPA's Office of Research and Development (ORD). Instead, the search was unreasonably limited to a few offices in Region 7 alone.

2. In addition, the cited Exemption 5 does not apply to the 15 withheld documents, for the following reasons:

a. To qualify for withholding under Exemption 5 the document must be "pre-decisional" and "deliberative." EPA v. Mink, 410 U.S. 73, 88 (1973). A document is "pre-decisional" if it is "antecedent to the adoption of agency policy" and "deliberative" if it is "related to the process by which policies are formulated." National Wildlife Federation v. U.S. Forest Service, 861 F.2d 1114, 1117 (9th Cir. 1988). In applying Exemption 5, "the agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process."

Reply to:
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Web Site: www.tlpj.org

Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980). “[T]he agency must identify a specific decision to which the document is predecisional.” Maricopa Audubon Society v. U.S. Forest Service, 108 F.3d 1089, 1094 (9th Cir. 1997).

EPA’s denial letter fails to identify any decision or deliberative process to which the documents relate. In his December 22, 2004 letter submitting the report to EPA, the Director of Lambert-St. Louis International Airport did not ask EPA to make any decision or change any agency policy in response to the report. The Airport Director merely stated that he “welcomes the Agency’s review of this data and analysis.” In response, EPA Region 7 stated on January 18, 2005 that it was undertaking an “independent review of the report and analysis, and will contact you to discuss our findings upon completion of our evaluation.” Thus, there is no past, pending or planned decision, either adjudicative or legislative, that EPA has identified in connection with this report. EPA is merely evaluating whether or not the report is based on good science and then providing its opinion on that question to the Airport. This does not qualify for non-disclosure under Exemption 5. Playboy Enterprises v. Dep’t of Justice, 677 F.2d 931, 935 (D.C. Cir. 1982) (a report is not within Exemption 5 if it is not “intertwined with the policy-making process of the decision-maker”).

b. Exemption 5 also does not protect “purely factual material appearing in . . . documents in a form that is severable without compromising the private remainder of the documents.” EPA v. Mink, 410 U.S. at 91. “[A] report does not become part of the deliberative process merely because it contains only those facts which the person making the report thinks material.” Playboy, 677 F.2d at 935. “[T]he exemptions of the FOIA do not apply wholesale. An item of exempt information does not insulate from disclosure the entire file in which it is contained, or even the entire page on which it appears.” Arieff v. Department of the Navy, 712 F.2d 1462, 1466 (D.C. Cir. 1983). The FOIA’s focus is on “information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material.” Schiller v. NRLB, 964 F.2d 1205, 1209 (D.C. Cir. 1992).

Among other things, I requested a copy of comments by EPA’s Asbestos Coordination Team (ACT) on the Airport’s report. In response, EPA has withheld at least two documents from the ACT. These documents almost certainly contain purely factual observations about the Airport’s report, since one of ACT’s roles is to provide peer review of scientific analyses. According to EPA’s 2000 Peer Review Handbook (p. 10), “peer review is an in-depth assessment of the assumptions, calculations, extrapolations, alternate interpretations, methodology, acceptance criteria, and conclusions pertaining to the specific major scientific and/or technical work product and of the documentation that supports them.” If that review has any quantitative component, it is probably factual. Thus, at a minimum, all purely factual material must be released. Ethyl Corp. v. EPA, 478 F.2d 47, 50 (4th Cir. 1973) (ordering disclosure of documents containing medical and scientific data); Bristol-Myers Co. v. FTC, 424 F.2d 935, 939 (D.C. Cir. 1970) (“Purely factual reports and scientific studies cannot be cloaked in secrecy” under

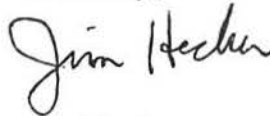
Freedom of Information Operations Staff
May 10, 2005
Page 3

Exemption 5).

For these reasons, I request that EPA immediately release all of the withheld documents that I requested in my March 17, 2005 FOIA request. Alternatively, if all of those documents cannot be released because of Exemption 5, I request that EPA release the portions of those documents that contain purely factual material.

FOIA requires that the Interior Department make a determination regarding this appeal within twenty business days of its receipt. 5 U.S.C. § 552(a)(6)(A)(ii); 40 C.F.R. § 2.104(k). Failure to respond in the required timely fashion may result in immediate legal action.

Sincerely,

A handwritten signature in cursive script that reads "Jim Hecker".

Jim Hecker

Counsel for FACTS

cc: Becky Dolph, EPA Region 7

Jim Hecker

From: Jim Hecker
Sent: Thursday, March 17, 2005 1:03 PM
To: 'r7foia@epa.gov'; 'hq.foia@epa.gov'
Subject: FOIA request re: analyses and reviews of report on asbestos demolition of St. Louis airport landscape building

Pursuant to the Freedom of Information Act, I request a copy of all evaluations, analyses, reviews, comments, and/or peer reviews concerning the December 17, 2004 "Technical Report on: Area Air, Soil and Water Monitoring during Asbestos Demolition Method Conducted at: Lambert-St. Louis International Airport, Landscape Building, 11101 Natural Bridge Road, Bridgeton, Missouri." This report was prepared for the City of St. Louis, owner and operator of Lambert-St. Louis International Airport, and prepared by Industrial Hygiene & Safety Technology, Inc. It was submitted to Deputy Administrator Stephen Johnson and Region 7 Administrator James Gulliford on or about December 22, 2004. This request includes any such documents prepared by EPA's Asbestos Coordination Team and/or the members thereof, either individually or as a group. This request also includes any documents relating to communications with representatives of the City of St. Louis, Lambert-St. Louis International Airport, or Industrial Hygiene & Safety Technology, Inc. concerning this report or reviews thereof. This request further includes a request for email and electronic documents that are within the category described in this paragraph. However, I am not requesting a copy of the report itself.

The time frame covered by this request is from December 22, 2004 to the present. I am requesting that EPA search its records concerning this request for employees assigned to its D.C. headquarters, Region 7, and Office of Research and Development. This includes, but is not limited to, relevant documents in the possession of Stephen Johnson, James Gulliford, Becky Dolph, Glen Shaul, and Roger Wilmoth.

I agree to pay for the cost of copying and searching for these documents, up to a cost of \$100. If the cost exceeds this amount, please call me. Thank you for your assistance.

Jim Hecker
Trial Lawyers for Public Justice
1717 Massachusetts Avenue, N.W. Suite 800
Washington, DC 20036
(202) 797-8600
(202) 232-7203 fax
jhecker@tlpj.org



RECEIVED APR 15 2005

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

13 APR 2005

Mr. Jim Hecker
Trial Lawyers for Public Justice
1717 Massachusetts Avenue, N.W.
Suite 800
Washington, DC 20036

Dear Mr. Hecker:

Freedom of Information Act Request
Number 07-RIN-00334-05

This is Region 7's response to the above-referenced request dated March 17, 2005, in which you requested copies of all evaluations, analyses, reviews, comments and/or peer reviews concerning the December 17, 2004, "Technical Report on : Area Air, Soil and Water Monitoring during Asbestos Demolition Method Conducted at: Lambert-St. Louis International Airport. Landscape Building 11101 Natural Bridge Road, Bridgeton, Missouri."


Enclosed is a copy of the only releasable document which is responsive to your request. Unfortunately, we are unable to supply you with copies of several documents which are being withheld. Enclosed is a list of those documents. This information has been determined to be exempt from mandatory disclosure by virtue of 5 U.S.C. 552(b)(5).

The basis for this partial denial is 40 C.F.R. 2.105(a)(5) which was published in the Federal Register, Vol. 67, No. 214, on Tuesday, November 5, 2002. This section of the regulations promulgated under the Freedom of Information Act exempts from mandatory disclosure inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the affected agency.

You may appeal this partial denial by submitting a written appeal to EPA Headquarters Freedom of Information Operations Staff (2822T), U.S. Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460 within 30 days of the date of the letter denying the request. Your appeal should refer to the RIN number listed above, the date of this determination, and my name, title and address. The appeal letter should also indicate the record which is the subject of the appeal.

As stated above, this is Region 7's response to your request. You will receive a separate response from our Office in Washington, DC, regarding any responsive documents they may have.

Sincerely,

for 
Martha R. Steincamp
Regional Counsel

Enclosures





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

18 JAN 2005

OFFICE OF
THE REGIONAL ADMINISTRATOR

Richard E. Hrabko
Director
Lambert-St. Louis International Airport
P.O. Box 10212
St. Louis, Missouri 63145-0212

Dear Mr. Hrabko:

The Agency is in receipt of the report and analysis of the Airport Landscape Building demolition. The Agency will now undertake its own independent review of the report and analysis, and will contact you to discuss our findings upon completion of our evaluation.

In the meantime, the Airport Authority continues to be free to conduct demolitions in conjunction with the airport expansion. All such demolitions shall be conducted in accordance with federal, state and local laws and regulations. Specifically, in conducting any demolitions the Airport Authority must comply with all requirements of the Clean Air Act; 40 C.F.R. Part 61, Subpart M; 10 C.S.R. Division 10, Chapter 6; and St. Louis County Air Pollution Control Code Section 612.530.

If you have any questions, please contact me at 913-551-7006 or Becky Dolph with the Office of Regional Counsel, at 913-551-7281.

Thank you for your continued cooperation in this matter.

Very truly yours,

James B. Gulliford
Regional Administrator

cc: Stephen L. Johnson, Deputy Administrator, EPA
Matt Ward, Esquire
Roger Walker, Esquire
Janet D. Williams, St. Louis County Department of Health

LIST OF WITHHELD DOCUMENTS

RELEASABLE:

01/18/2005 Letter from RA to SLAA

WITHHELD DOCUMENTS:

01/07/2005: Dolph's notes
Attorney work product

01/07/2005 Email from Becky Dolph to James Gulliford
Attorney/Client Communication

01/18/2005: Dolph's notes
Attorney work product

01/31/2005: Dolph's notes
Attorney work product

2/2/2005 Email from Becky Dolph to Lynn Slugantz
Attorney/Client Communication

02/02/2005 Email from Becky Dolph to James Gulliford
Attorney/Client Communication

03/12/2005 Memorandum from Roger Wilmoth to William Farland
Deliberative Process/Draft

03/17/2005 Email from Becky Dolph to James Gulliford
Attorney/Client Communication

Undated Communication Strategy
Deliberative Process/Draft

Undated Draft Memo from Hacker to Slugantz regarding review of St. Louis Asbestos
report
Pre-Decisional

02/07/2005 Notes from conference call (Slugantz, Dolph, Wilmoth) regarding comments
coming in on report
Attorney/Client Communication

02/16/2005 Notes from conference call (Slugantz, Dolph, Wilmoth) regarding comments
coming in on report
Attorney/Client Communication

Page 2

02/24/2005	Email from Miller to Simons regarding ACT review of the St. Louis Asbestos Report Pre-Decisional
03/01/2005	Notes from National Asbestos Conference Call, ACT review of St Louis Report Pre-Decisional
03/16/2005	Email from Wilmoth to Farland, Dolph, Slugantz, draft review report Pre-Decisional



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

May 12, 2005

Mr. Jim Hecker
Trial Lawyers for Public Justice
1717 Massachusetts Ave NW
Suite 800 - D. C.
Washington, 20036
United States

RE: Freedom of Information Act (FOIA), 5 U.S.C. 552
Request No: HQ-APP-00014-05

Dear Mr. Hecker,

This is to acknowledge receipt of your Freedom of Information Act (FOIA) Appeal, 5 U.S.C. 552, request dated May 10, 2005 and received in this office on May 10, 2005, for records related to:

All evaluations, analyses, reviews, comments, and/or peer reviews concerning the 12/17/04 Technical Report on: Area Air, Soil and Water Monitoring during Asbestos Demolition Method Conducted at: Lambert-St. Louis International Airport, Landscape Building, 11101 Natural Bridge Road, Bridgeton, Missouri

The program(s) and/or regional office(s) that have been assigned this request will be responding to you directly.

In the interim, if you have any questions, please contact me at 202-566-1667. Please provide your FOIA request number in all communications.

Sincerely,

Larry F. Gottesman
National FOIA Officer

By: Linda Person, FOIA Specialist



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

May 17, 2005

Jim Hecker
Trial Lawyers for Public Justice
1717 Massachusetts Ave., NW - Suite 800
Washington, DC 20036

Re: Freedom of Information Act Appeal 07-RIN-00334-05-A

Dear Mr. Hecker:

This letter is being sent to acknowledge receipt of your FOIA appeal received in the Office of General Counsel on May 13, 2005.

Sincerely,

A handwritten signature in cursive script that reads "Barbara Bruce".

Barbara Bruce
FOIA Specialist
Finance and Operations Law Office